No. 85-1437

Supreme Court, U.S.
FILED
FEB 26 1986
JOSEPH F. SPANIOL, JR.
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1985

PATRICIA WILKINS,

Petitioner,

v.

CHRISTOPHER SAYRES, RONALD LOVEJOY, JOSEPH ENGLEHARDT, EDDIE SANCHEZ, RICHARD BUCHOLTZ,

Respondents.

PATRICIA WILKINS,

Petitioner,

v.

FREDERICK ROUSCH, ORRIE YNIQUEZ, WILLIAM COWHEY, WALTER JACKSON,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

STEPHEN YAGMAN, a member of
YAGMAN & YAGMAN, P.C.
10880 Wilshire Boulevard
Suite 1900
Los Angeles, California 90024
(213) 475-4988

Attorneys for Petitioner
Patricia Wilkins

QUESTION PRESENTED

In a civil rights action brought pursuant to 42 U.S.C. 1983 (1982), in which the affirmative defense of qualified immunity has been asserted, and in which the trial court has determined that the federal constitutional rights alleged to have been violated were clearly established at the time of the alleged violation, may the trial court instruct the jury on the affirmative defense of qualified immunity?

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CHRISTOPHER SAYRES, ET AL., RESPONDENTS.

PATRICIA WILKINS, PETITIONER,

v.

FREDERICK ROUSCH, ET AL., RESPONDENTS.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Patricia Wilkins petitions this Court for a writ of certiorari to review the judgments of the United States Court of Appeals for the Ninth Circuit in these cases.

OPINION BELOW

The opinions of the Court of Appeals (App. A., 1a-6a and App. B, 1b-3b, infra) are Memoranda not for publication.

JURISDICTION

The judgments of the Court of Appeals were entered on February 4, 1986 and Februarv 19, 1986, respectively. This Court's jurisdiction is invoked pursuant to 28 U.S.C. 1254(1) and Rule 19.4 of this Court.

STATEMENT

In the complaints, CR-1, it is alleged that defendant Anaheim, California police officers illegally detained plaintiff in violation of her rights under the Fourth Amendment to the United States Constitution, Wilkins v. Sayres, and entered plaintiff's home and searched it, Wilkins v. Rousch. (These incidents were separate and unrelated and occurred at different places and times.)

Separate trials were had, and the juries returned verdicts for defendants. Memoranda, App. A, at 1a, App. B at 1b. Before instructing the jury, the Court ruled that the law with respect to Wilkins' detention was clearly established at the time of the challenged conduct and that the law with respect to entry and search was clearly established at the time of the challenged conduct. Ibid. Yet, the Court instructed the juries on the defense of qualified immunity.

REASONS FOR GRANTING THE PETITION

1. There has been a faulty construction of decisions of this Court which will affect virtually every action brought under 42 U.S.C. 1983 and pursuant to this Court's opinion in Bivins v. Six Unknown Agents, 403 U.S. 388 (1971).

2. Public officials have used methods which are alien to our American system of justice.

3. The opinions below are at odds with

A. decisions in the same Circuit, and

B. decisions in other circuits.

Petitioner is cognizant of the fact that the Supreme Court does not sit as a court of errors, but rather sits to resolve important issues of federal law.

The fundamental civil rights laws which govern the conduct of all law enforcement officers throughout this Country and which provide for remedies for those who allege and prove that their federal civil rights were violated, have been interpreted in such a way so as to pervert their meaning, invite illegal and unethical conduct, and impugn the integrity of the federal courts.

Specifically, 42 U.S.C. 1983 has been interpreted in such a way as to provide a defense to allegations of wrongdoing by police officers with which this Court has done away,

and with respect to which other decisions both in the same Circuit and in other Circuits are at odds.

1. THIS COURT DID AWAY WITH THE SUBJECTIVE COMPONENT OF THE DEFENSE OF QUALIFIED IMMUNITY.

In Harlow v. Fitzgerald, 457 U.S. 800 (1982), this Court did away with the subjective component of the affirmative defense of qualified immunity. In Mitchell v. Forsythe, 105 S. Ct. 2806, 2816 (1985), this Court held:

> All [a court] need determine [on a motion to adjudicate the issue of qualified immunity] is a question of law: whether the legal norms allegedly violated by the defendant were clearly established at the time of the challenged actions ....

Thus, the effect of both Harlow and Mitchell was to reduce the question of the applicability of the affirmative defense of qualified

immunity to a purely legal question. In so doing, this Court sub silentio, modified its holding in Procunier v. Navarette, 434 U.S. 555, 562 (1978), to the extent Procunier provided that part of the test on determining the applicability of the qualified immunity defense was "if [defendants] knew or should have known of [the] right [violated], and if [defendants] should have known that their conduct violated the constitutional norm." The "knew or should have known" part of the Procunier test was part of the subjective component of the defense, and was done away with in Harlow.

The issue of qualified immunity is one purely of law: if the law was clear, the defense is inapplicable; if the law was not clear, not only is the defense applicable, but the action is over for the plaintiff, for the defense operates as a bar to suit.

Both the trial court and the Court of Appeals failed to follow this Court's holdings in both Harlow and Mitchell. See also, Davis v. Scherer, 104 S. Ct. 3012, 3018 (1984).

Therefore, on this ground, certiorari should be granted.

2. THE CONSTRUCTION GIVEN BY THE COURTS BELOW TO THE DEFENSE WILL OPERATE TO PERMIT PUBLIC OFFICIALS TO ESCAPE LIABILITY FOR WRONGFUL CONDUCT BASED ON A THEORY OF DEFENSE WHICH NO LONGER EXISTS.

In the complaints it is alleged that defendant police used methods alien to our Constitution. To permit these officials to escape potential liability based on a defense which this Court has ruled no longer exists, in the form in which it existed prior to this Court's decisions in Harlow, Mitchell and Scherer, is a result which will have a significant deliterious effect on constitutional

litigation at least throughout the vast environs of the Ninth Circuit so that this Court should grant certiorari.

3. THE OPINIONS BELOW ARE AT ODDS BOTH WITH DECISIONS IN THE NINTH CIRCUIT AND OTHER CIRCUITS.

A. The opinions below are at odds with other Ninth Circuit decisions. See, Lowe v. City of Monrovia, 775 F. 2d 998, 1011 (9th Cir. 1985); Flores v. Pierce, 617 F. 2d 1386, 1391-92 (9th Cir.), cert. denied, 449 U.S. 875 (1980); Haygood v. Younger, 717 F. 2d 1472, 1483 (9th Cir. 1983), withdrawn, 729 F. 2d 613 (9th Cir. 1984), reversed on other grounds, 769 F. 2d 1350 (9th Cir. 1985); but see, Bilbrey v. Brown, 738 F. 2d 1462 (9th Cir. 1984).

B. The opinions below are at odds with the decisions in all other Circuits who have ruled on this issue. See, B.C.R. v. Fontaine, 727 F. 2d 7, 10 (1st Cir. 1984); Trejo v. Perez, 693 F. 2d 482, 485 (5th Cir.

1982); Stokes v. Delcambre, 710 F. 2d 1120, 1125 (5th Cir. 1983); Donta v. Hooper, 774 F. 2d 716, 719 (6th Cir. 1985); Windsor v. Tennessean, 719 F. 2d 155, 165 (6th Cir. 1983); cert. denied, 105 S. Ct. 105 (1984); Patzner v. Burkett, 779 F. 2d 1363, 1371 (8th Cir. 1985); Goodwin v. Circuit Court, 729 F. 2d 541 (8th Cir. 1984). Cf. Skevofilax v. Quigley, 585 F. Supp. 582 (D.N.J. 1984) (an excellent discussion of what a trial court must do in order to implement this Court's instructions on application of the Harlow qualified immunity test).

4. CONCLUSION

What the trial court did, and what the appeals court affirmed, constitutes an application of the qualified immunity defense in civil rights actions which was abandoned by this Court in 1982. In effect, the courts below have held that there still is a subjective component of the defense. Since competent public officials are presumed to know clearly

established law and what conduct is proscribed by clearly established law, Harlow, supra, once a trial court has determined, as it must under Harlow, that the applicable law was clearly established at the relevant time, it is impermissible for that Court then to instruct the jury on the defense of qualified immunity and ask it to determine whether the officer, as the Court of Appeals below held, "should have known of that right['s existence] and ... if they knew or should have know that their conduct violated the constitutional norm." Memorandum, infra, at 3a. That is a formulation of the subjective component of the defense this Court did away with in Harlow.

It is important that this Court make perfectly clear its holding in Harlow so that its prescription will be applied with uniformity throughout the various Circuits in the federal system and within the environs of the vast Ninth Circuit.

This petition should be granted.

STEPHEN YAGMAN, a member of
YAGMAN & YAGMAN, P.C.

Attorneys for Petitioner
Patricia Wilkins

APPENDIX A

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED
February 4, 1986
CATHY A. CATTERSON
U.S. COURT OF APPEALS

PATRICIA WILKINS,	
Plaintiff-Appellant,	No. 84-6437
vs.	D.C. NO. CV 83-45683-PAR
CHRISTOPHER SAYRES, et al.,	
Defendant Appellees.	MEMORANDUM*

Appeal from the United States District Court
for the Central District of California
Hon. Pamela A. Rymer, District Judge, Presiding
Submitted November 14, 1985**

BEFORE: WALLACE, SKOPIL and FLETCHER,
Circuit Judges

Patricia Wilkins appeals from a jury verdict for defendant Anaheim police officers

* This disposition is not appropriate for publication and may not be cited to or by the Courts of this Circuit except as provided by 9th Cir. R. 21.

** The panel finds this case appropriate for submission without oral argument pursuant to Fed. R. App. P. 34(a); 9th Cir. R. 3(f).

and other individuals in her 42 U.S.C. 1983 action alleging that the defendants illegally detained her. Wilkins contends that the trial judge erred by instructing the jury on the defense of good faith immunity. She asserts that this defense was unavailable as a matter of law because the trial judge determined the law regarding the detention was settled at the time of the alleged infringement of her rights.

STANDARD OF REVIEW

This court review de novo the district court's decision to instruct the jury on the defense of good faith immunity because the court ruled as a matter of law that the instruction should be given. See United States v. McConney, 728 F. 2d 1195, 1201 (9th Cir.) (en banc), cert. denied, 105 S. Ct. 101 (1984).

ANALYSIS

The requirements for good faith immunity of public officials were explained in Procunier v. Navarette, 434 U.S. 555 (1978). The defense

is not available to public officials "[(1)] if the constitutional right alleged infringed ... was clearly established at the time of their challenged conduct, [(2)] if they knew or should have known of that right, and [(3)] if they knew or should have known that their conduct violated the constitutional norm." Id. at 562. Here, the trial court decided the first two elements of a qualified immunity defense as a matter of law, but instructed the jury on the third element.

The parties do not dispute the trial court's ruling that the law with respect to Wilkins' detention was clearly established at the time of the challenged conduct. The only question is whether this determination precluded the court from instructing the jury on the third element of a qualified immunity defense. Wilkins contends that as a matter of law the court may not instruct on the immunity defense where it determines that the law was clear.

This argument lacks merit. Wilkins misinterprets Supreme Court decisions on the immunity defense and ignores recent Ninth Circuit authority holding that the defense may present a jury question. See Harlow v. Fitzgerald, 457 U.S. 800 (1982); Bilbrey v. Brown, 738 F. 2d 1462 (9th Cir. 1984).

In Bilbrey, this court rejected the notion that the immunity defense is unavailable where the court determines that the law regarding the challenged conduct is clear. Id. at 1466-67. The court said that even "if [state officials] should have been aware of [plaintiffs' settled] Fourth Amendment rights, it is not true that the immunity defense was unavailable to them as a matter of law." Id. 1466. State officials qualify for immunity, the court said, if they "reasonably, but mistakenly, believed that they had reasonable cause or probable cause to search." Id. at 1467. Although the inquiry whether the legal right is settled is a

question for the court, "the existence of a reasonable belief that a search is lawful, viewed in light of the 'settled' nature of the law, is a question for the trier of fact." Id. The only exception is where the critical factual issues are undisputed and the court can determine as a matter of law that defendants did not act in good faith. See Fujiwara v. Clark, 703 F. 2d 357, 362 (9th Cir. 1983). Wilkins does not argue that the exception applies to this case.

Wilkins misinterprets Harlow v. Fitzgerald, 457 U.S. 800 (1982), as precluding the defense of a qualified immunity whenever the court determines that the law is not clear. Harlow holds only that a public official is not expected to know the law where it was not clearly established at the time of the challenged conduct. Id. at 818-19. It does not follow that immunity is unavailable as a matter of law where the court determines that the law

was clear. See Bilbrey, 738 F. 2d at 1466. Although, as Harlow notes, a reasonably competent public official ordinarily is expected to know the settled law, 457 U.S. at 818-19, this conclusion is distinct from the conclusion that he should have known that his conduct violated the settled law. See Bilbrey, 738 F. 2d at 1466-67.

Thus, although the district court found that the law regarding Wilkins' detention was clear at the time of the incident that precipitated this lawsuit, it properly instructed the jury to determine whether defendant police officers reasonably believed that their conduct comported with the settled law. See id.

AFFIRMED.

APPENDIX B

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED
February 19, 1986
CATHY A. CATTERSON
U.S. COURT OF APPEALS

PATRICIA WILKINS,	)	
	)	
Plaintiff-Appellant,	)	No. 85-5850
	)	
vs.	)	D.C. NO.
	)	CV 83-6935-PAR
FREDERICK ROUSCH, et al.,	)	
	)	
Defendant Appellees.	)	MEMORANDUM*
	)	

Appeal from the United States District Court
for the Central District of California
Hon. Pamela A. Rymer, District Judge, Presiding
Submitted February 7, 1986**

BEFORE: KENNEDY, SKOPIL, and ALARCON,
Circuit Judges

Patricia Wilkins sued Anaheim police officers and others pursuant to 42 U.S.C. 1983

* This disposition is not appropriate for publication and may not be cited to or by the Courts of this Circuit except as provided by 9th Cir. R. 21.

** The panel unanimously finds this case suitable for submission on the record and briefs and without oral argument. Fed. R. App. P. 34(a), 9th Cir. R. 3(f).

alleging an unlawful entry and search of her home. Wilkins contends the trial court erred in instructing the jury on the defense of good-faith immunity because the court determined that the law regarding the entry and search of her home was well-settled at the time of the alleged infringement of her rights. We affirm.

The district court's conclusion that the law with regard to an unlawful entry and search was well-established does not render the immunity defense unavailable as a matter of law. Bilbrey v. Brown, 738 F. 2d 1426, 1466-67 (9th Cir. 1984). In Bilbrey, this court held that state officials qualify for immunity if they "reasonably, but mistakenly, believe that they had reasonable cause or probable cause to search." Id. at 1467. Further, "the existence of a reasonable belief that a search is lawful, viewed in light of the 'settled' nature

of the law, is a question for the trier of fact." Id.

Despite the district court's conclusion that the law regarding the alleged unlawful entry and search of Wilkins' home was clearly established, the court properly instructed the jury to determine whether the defendant police officers reasonably believed their conduct comported with the settled law.

AFFIRMED.

No. 85-1437

Supreme Court, U.S.
FILED
APR 17 1986
JOSEPH F. SPANIOL, JR.
CLERK

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SUPPLEMENT TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

STEPHEN YAGMAN, a member of
YAGMAN & YAGMAN, P.C.
10880 Wilshire Boulevard
Suite 1900
Los Angeles, California 90024
(213) 475-4988

Attorneys for Petitioner
Patricia Wilkins

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42 U.S.C. 1983 (1982) 1

In the Supreme Court of the United States

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CHRISTOPHER SAYRES, ET AL., RESPONDENTS.

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v.

FREDERICK ROUSCH, ET AL., RESPONDENTS.

SUPPLEMENT TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioner submits this Supplement to her Petition for Writ of Certiorari to set forth new authority for the position taken by petitioner in her Petition; to wit, that in civil rights actions brought under 42 U.S.C. 1983 (1982), in instances that the law was clearly

established with respect to the constitutional right alleged to have been violated, no jury instruction may be given on the affirmative defense of qualified immunity; and to demonstrate that the law in the Tenth Circuit is in direct conflict with the law in the Ninth Circuit by virtue of the Tenth Circuit opinion cited herein.

In Lutz v. Weld County School District, 784 F. 2d 340 (10th Cir. 1986) (reported in this week's Federal Reporter advance sheet), the court held:

> As it happens, at the time of this lawsuit federal law clearly prohibited discrimination against an otherwise qualified handicapped person. Defendants were therefore entitled to an instruction on their qualified immunity defense only by raising a fact issue as to whether there were exceptional circumstances such that a

> reasonable person in their positions would not have known the relevant legal standard. [Citation to Harlow omitted.]
>
> No such "extraordinary circumstances" were alleged by the defendants in this case, and there was therefore no fact issue concerning the defense to be submitted to the jury. See Davis v. Scherer, 468 U.S. 183, 104 S. Ct. 3012, 3018, 82 L. Ed. 2d 139 (1984) ("no other 'circumstances' are relevant to the issue of qualified immunity").

Lutz fully supports petitioner's position as taken in her Petition and is an accurate statement of the law on qualified immunity. Since the District Court in petitioner's case found, as a matter of law, that the relevant law was clear, and since defendants did not allege any "special circumstances," defendants

were not entitled to have their defense of qualified immunity go to the jury, and it was error for an instruction on qualified immunity to have been given. Hence, the Court of Appeals should have reversed the judgment in favor of defendants.

Additionally, the law on this point is in conflict between the Ninth and Tenth Circuits.

STEPHEN YAGMAN, a member of
YAGMAN & YAGMAN, P.C.

Attorneys for Petitioner
Patricia Wilkins

No. 85-1437 (3)

Supreme Court, U.S.
FILED
MAY 14 1986
JOSEPH F. SPANIOLO, JR.
CLERK

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Respondents.

SECOND SUPPLEMENT TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

STEPHEN YAGMAN, a member of
YAGMAN & YAGMAN, P.C.
10880 Wilshire Boulevard
Suite 1900
Los Angeles, California 90024
(213) 475-4988

Attorneys for Petitioner
Patricia Wilkins

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In the Supreme Court of the United States

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PATRICIA WILKINS, PETITIONER,

v.

FREDERICK ROUSCH, ET AL., RESPONDENTS.

SUPPLEMENT TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioner submits this Supplement to her Petition for Writ of Certiorari to set forth new authority for the position taken by petitioner in her Petition; to wit, that in civil rights actions brought under 42 U.S.C. 1983 (1982), in instances that the law was clearly

established with respect to the constitutional right alleged to have been violated, no jury instruction may be given on the affirmative defense of qualified immunity; and to demonstrate that the law in the Seventh Circuit is in direct conflict with the law in the Ninth Circuit by virtue of the Seventh Circuit opinion cited herein, which was reported yesterday.

In Benson v. Allphin, 786 F.2d 268, 274 (7th Cir. 1986) (reported in this week's Federal Reporter advance sheet), the court held:

> [T]he question of qualified immunity is addressed to the court, not the jury. See Mitchell v. Forsyth, ___ U.S. ___, 105 S. Ct. 2806, 86 L. Ed 2d 411 (1985); Harlow, 457 U.S. at 818-19, 102 S. Ct. at 2738-39; Bates v. Jean, 745 F. 2d 1146, 1151 (7th Cir. 1984).
>
> ...

[T]he issue of qualified immunity is one for the trial court, not the jury.

Benson fully supports petitioner's position as taken in her Petition and is an accurate statement of the law on qualified immunity. Since the District Court in petitioner's case found, as a matter of law, that the relevant law was clear, defendants were not entitled to have their defense of qualified immunity go to the jury, and it was error for an instruction on qualified immunity to have been given. Hence, the Court of Appeals should have reversed the judgment in favor of defendants.

Additionally, the law on this point is in conflict between the Ninth and Seventh Circuits, as well as between the Ninth and Tenth Circuits. See Supplement to Petition for Writ of Certiorari at 4.

STEPHEN YAGMAN, a member of
YAGMAN & YAGMAN, P.C.

Attorneys for Petitioner
Patricia Wilkins

Supreme Court, U.S.
FILED
MAY 12 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-1437 (4)

IN THE
SUPREME COURT
OF THE UNITED STATES
October Term, 1985

PATRICIA WILKINS,

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vs.

CHRISTOPHER SAYRES, RONALD LOVEJOY, JOSEPH ENGLEHARDT, EDDIE SANCHEZ, RICHARD BUCHOLTZ,

Respondents.

PATRICIA WILKINS,

Petitioner,

vs.

FREDERICK ROUSCH, ORRIE YNIQUEZ, WILLIAM COWHEY, WALTER JACKSON,

Respondents.

RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

JEFFREY M. EPSTEIN
COTKIN, COLLINS, KOLTS & FRANSCELL
550 South Hill Street, Suite 1300
Los Angeles, California 90013
(213) 627-2696
Attorneys for Respondents

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STATEMENT OF FACTS

The Petitioner filed a Complaint in the District Court which alleged that on July 16, 1983, employees of an Alpha Beta Market in Anaheim, California telephoned the Anaheim Police Department. The Complaint alleged further that the Anaheim police officers detained and searched Petitioner without legal justification.

At the close of testimony, a discussion was held between the District Court Judge and all of the parties regarding the proposed jury instructions. The District Court Judge instructed the jury regarding the qualified immunity defense for the defendant police officers. The jury returned a general verdict in favor of all defendants - the police officers, Alpha Beta Markets, and the Alpha Beta employees.

I. IN HARLOW v. FITZGERALD, THIS COURT MERELY ELIMINATED THE SUBJECTIVE ELEMENT OF THE QUALIFIED IMMUNITY, WHILE RETAINING THE OBJECTIVE ELEMENT.

In Harlow v. Fitzgerald, 457 U.S. 800, 73 L.Ed.2d 396 (1982), this Court initially reviewed the qualified or "good faith" immunity from personal liability for damages stemming from a violation of an individual's constitutional rights. The Harlow Court stated that previous decisions by this Court had established that the good faith defense had both an objective and subjective element. Id. at 815. The Harlow Court stated that the objective element dealt with whether an official "knew or reasonably should have known that the action he took within his sphere of official responsibility

would violate the constitutional rights of the plaintiff". Id. (Emphasis in original.) This Court also stated that the subjective element of the good faith defense involved whether an official "took the action with the malicious intention to cause a deprivation of the constitutional rights or other injury ..." Id. (Emphasis in original.)

The Harlow Court then went on to hold that the subjective element, dealing with the malicious intention of the official, should be eliminated. 457 U.S. at 817. This Court, therefore, held that government officials should be shielded from liability for civil damages for violations of constitutional rights if "their conduct does not violated clearly established statutory or constitutional rights of which a reasonable person would have known." Id. at 818.

It is important to note that this Court merely eliminated the subjective element, characterized as a malicious intention to cause a deprivation of constitutional rights, but has left untouched the objective element. As was pointed out by Justice White in his concurring opinion in the case of Illinois v. Gates, this Court modified the qualified immunity by eliminating the subjective component of that defense. ____ U.S. ____, 76 L.Ed.2d 527, 567 (1983). Therefore, previous case law which has interpreted the objective element of the good faith defense is still valid.

The Ninth Circuit has recognized that although the subjective element of the good faith defense has been eliminated by this Court, the previous case law dealing with the objective element is still valid. In Fujiwara v. Clark, 703 F.2d 357 (9th Cir.

1983), the Court made note of the fact that in Harlow v. Fitzgerald this Court had eliminated the subjective element, based upon malice or bad motive, of the good faith defense. Id. at 359, Footnote 3. The Fujiwara Court stated that it need only consider the objective element of the good faith defense as a result of this Court's decision in Harlow v. Fitzgerald. The Fujiwara Court then went on to rely on cases which were decided prior to Harlow v. Fitzgerald and which analyzed the objective element of the good faith defense. Id. at 359-60. Thus, it is proper to utilize prior case law which deals with the objective element of the good faith defense.

II. THE DISTRICT COURT WAS CORRECT IN HAVING THE JURY DETERMINE THE THIRD PRONG OF THE PROCUNIER RULE, SO THAT THE JURY COULD DETERMINE IF THE POLICE OFFICERS HAD ESTABLISHED THE DEFENSE OF THE QUALIFIED IMMUNITY.

The objective element of the qualified immunity was explained by this Court in the case of Wood v. Strickland, 420 U.S. 306, 43 L.Ed.2d 214 (1975). In Wood, this Court held held that a government official is immune from liability unless the official "knew or reasonably should have known that the action he took within his sphere of official responsibility would violate the constitutional rights of the [citizen] affected ..." Id. at 322. This Court elaborated on the qualified immunity

standard delineated in Wood v. Strickland, in the case of Procunier v. Navarette, 434 U.S. 555, 55 L.Ed.2d 24 (1977).

In Procunier, this Court broke down the Wood v. Strickland rule into three parts. The qualified immunity would not be available to a public official: (1) if the constitutional right allegedly infringed was clearly established at the time of the challenged conduct; (2) if the public official knew or should have known of that right; and (3) if the public official knew or should have known that his conduct violated the constitutional norm. 434 U.S. at 562.

The Ninth Circuit Court of Appeals, in the case of Fujiwara v. Clark, 703 F.2d 357 (9th Cir. 1983), has held that all three prongs of the Procunier tests must be considered in determining whether a public

official has established the qualified immunity. Id. at 359-60.

The Ninth Circuit has recently reaffirmed the holding in Fujiwara that all three prongs of the Procunier test must be considered in determining whether the defense of qualified immunity is available to a public official. In the case of Bilbrey By Bilbrey v. Brown, 738 F.2d 1462 (9th Cir. 1984), the Ninth Circuit was confronted with the issue of whether the qualified immunity defense was available to state officials who had conducted searches of high school students. Id. at 1463-64. After discussing the applicability of the first two prongs of the Procunier rule, the Brown Court addressed the issue of whether the qualified immunity was available even though it determined that the constitutional right was clearly established and that the public officials

knew or should have known of that right. Id. at 1466.

The Brown Court held that if public officials can show that they neither knew nor should have known that their conduct violated the constitutional norm, then the defense of qualified immunity is available. 738 F.2d at 1466-67. If a public official can prove that he neither knew or should have known that his conduct violated constitutional norms, then he has proved that there existed reasonable grounds for the belief that his actions were appropriate. The Brown Court, in the context of Fourth Amendment rights regarding search and seizure, stated this rule in the following way:

> "[even] if [public officials] should have been aware of . . . Fourth Amendment rights, it is not true that the immunity

> defense was unavailable to them as a matter of law . . . [public officials] could . . . qualify for immunity from damages if they reasonably, but mistakenly, believed that they had reasonable cause or probable cause to search Appellants."

738 F.2d at 1466-67.

In addition, the Brown Court held that although the first two prongs of the Procunier test might often best be decided by a trial judge, the third prong is a question of fact to be decided by the trier of fact. 738 F.2d at 1467. The Brown Court stated this holding, in the context of the facts of that case, in the following way:

> "and although the antecedent

> inquiry, whether legal rights have been settled, may often best be resolved by the trial judge . . . the existence of a reasonable believe that a search is lawful, viewed in light of the 'settled' nature of the law, is a question for the trier of fact."

Id. at 1467.

The District Court Judge correctly analyzed the approach to the qualified immunity for public officials in conformance with the holding of the Ninth Circuit in the Brown case. The District Court Judge instructed the jury that although she had determined that the law was clearly established at the time the police officers acted, the jury was to determine whether the

defendant police officers reasonably believed that their conduct comported with the settled law. Thus, the District Court correctly allowed the jury to determine the third prong of the Procunier rule in order to determine if the police officers had established the defense of qualified immunity.

III. CONCLUSION

For all of the reasons stated above, the respondents submit that certiorari should be denied.

DATED: May 6, 1986

Respectfully submitted,

COTKIN, COLLINS, KOLTS & FRANSCELL

By: Jeffrey M. Epstein
JEFFREY M. EPSTEIN
Attorneys for Respondents

No. 85-1437 (D)

Supreme Court, U.S.
FILED
DEC 29 1986
JOSEPH F. SPANIOL, JR.
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1985

PATRICIA WILKINS,

Petitioner,

v.

CHRISTOPHER SAYRES, RONALD LOVEJOY, JOSEPH ENGLEHARDT, EDDIE SANCHEZ, RICHARD BUCHOLTZ,

Respondents.

PATRICIA WILKINS,

Petitioner,

v.

FREDERICK ROUSCH, ORRIE YNIQUEZ, WILLIAM COWHEY, WALTER JACKSON,

Respondents.

THIRD SUPPLEMENT TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

STEPHEN YAGMAN, a member of
YAGMAN & YAGMAN, P.C.
10880 Wilshire Boulevard
Suite 1900
Los Angeles, California 90024
(213) 475-4988

Attorneys for Petitioner
Patricia Wilkins

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In the Supreme Court of the United States

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CHRISTOPHER SAYRES, ET AL., RESPONDENTS.

PATRICIA WILKINS, PETITIONER,

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FREDERICK ROUSCH, ET AL., RESPONDENTS.

SUPPLEMENT TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioner submits this Supplement to her Petition for Writ of Certiorari to set forth new authority for the position taken by petitioner in her Petition; to wit, that in civil rights actions brought under 42 U.S.C. 1983 (1982), in instances that the law was clearly

established with respect to the constitutional right alleged to have been violated, no jury instruction may be given on the affirmative defense of qualified immunity; and to demonstrate that the law in the Second Circuit is in direct conflict with the law in the Ninth Circuit by virtue of the Second Circuit opinions cited herein, which reported since Petitioner's Second Supplement was filed.

In Weber v. Dell, 804 F. 2d 796, 803 (2d Cir. 1986), reported December 22, 1986, the court held as follows:

> In Salahuddin v. Coughlin, 781 F. 2d 24 (2d Cir. 1986), this court explained the Harlow test as follows: "The pertinent test in applying [the objective good-faith] defense is whether the federal law violated was clearly established, ... not whether a reasonable person would have

> known of the law." Id. at 27 (citations omitted). [Since] the law was clearly established ... the Sheriff is not entitled to the good-faith immunity defense. See Jones v. Edwards, 770 F. 2d 739, 742 n. 4 (8th Cir. 1985).

Weber, and Salahuddin, both fully support petitioner's position as taken in her Petition and are accurate statements on the law of qualified immunity. Since the District Court in petitioner's case found, as a matter of law, that the relevant law was clear, defendants were not entitled to have their defense of qualified immunity to to the jury, and it was error for an instruction on qualified immunity to have been given.

Additionally, these cases put pay to defendants' contention that notwithstanding a finding that the relevant legal norm was

clearly established, a jury still must determine the issue of "whether a reasonable person would have known of the law." Ibid. Only when "extraordinary circumstances," Harlow v. Fitzgerald, 457 U.S. 800 (1982), are both pled and proved may the issue of whether a reasonable person would have known of the law be presented to a jury. Only in the Ninth Circuit is this issue presented to a jury both when it is found that the relevant legal norm is clearly established and when "extraordinary circumstances" are neither pled nor proved.

The law on this point is in conflict between the Ninth Circuit and the Second Circuit, as well as between the Ninth Circuit and the Seventh and Tenth Circuits. See Supplement to Petition for Writ of Certiorari and Second Supplement to Petition for Writ of Certiorari.

STEPHEN YAGMAN, a member
of YAGMAN & YAGMAN, P.C.
Attorneys for Petitioner